No. 84246-9

WASHINGTON STATE SUPREME COURT

MARTIN MELLISH, Petitioner
(Respondent in Court of Appeals)

v.

FROG MOUNTAIN PET CARE, HAROLD AND JANE ELYEA, Respondents
(Appellants in Court of Appeals)

and

JEFFERSON COUNTY, Respondent
(Respondent in Court of Appeals)

SUPPLEMENTAL BRIEF

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INTRODUCTION

Pro se appellant Martin Mellish has no formal legal training, and craves the court's indulgence for any unintentional errors or violations of proper legal form and etiquette.

For reasons of brevity, the decision of the Division I Court of Appeals, issued on 4 February 2010 and being appealed, is referred to throughout this brief as 'the Opinion'

The initial version of the Opinion was retracted and revised in response to Appellant's Motion for Reconsideration. Page and paragraph numbers relating to the Opinion refer to the newer version.

ASSIGNMENT OF ERROR

The Opinion errs in holding that the timely filing of a Motion for Reconsideration does not toll LUPA's appeals deadline.

STATEMENT OF THE CASE

The Jefferson County Hearing Examiner issued two administrative decisions on a conditional use/variance permit for applicants Frog Mountain Pet Care and Harold and Jane Elyea ('Frog Mountain'). The first administrative decision, mailed to the parties on June 21, 2007, was titled Office of the Hearing Examiner Jefferson County Report and Decision. Under Jefferson County Code, it was subject to a motion for reconsideration to the Hearing Examiner. Mr Mellish filed a timely motion for reconsideration, and the Hearing Examiner accepted and processed the motion. The second and last County administrative decision, denying the Motion for Reconsideration, was mailed on July 21, 2007. A Land Use Petition Act petition was filed and served on respondents Frog Mountain and Jefferson County on August 10, 2007. This date of filing is within twenty-

one days of the denial of the Motion for Reconsideration, but not within twenty-one days of the initial decision.

Frog Mountain challenged the timeliness of the LUPA filing before Judge Williams of Clallam County. Respondent Jefferson County took the unusual step of filing a memorandum stating that, in their view, the LUPA petition filed against them was timely filed. Judge Williams found that the petition was timely filed, and in due course found for Mr Mellish on the merits.

Frog Mountain then appealed to the Division II Court of Appeals. Frog Mountain did not question the decision on the merits, only the timeliness of Mr Mellish's LUPA petition. The Appeals Court issued an Opinion finding for Frog Mountain on December 15th 2009.

Mr Mellish then filed a Motion for Reconsideration on January 4th 2010, making many of the same points as in this brief, and pointing out, specifically, that the claim made in the Opinion that the Opinion was consistent with *Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 232 P.3d 558 (2010)('*Skinner*' and *Hall v. Seattle School District*, 66 Wn. App. 308, 831 P.2d 1128 ("*Hall*") was incorrect. The Appeals Court retracted their original Opinion February 3rd 2010, and issued a new one February 4th 2010. The new Opinion was identical with the previous one, except that the claim to be consistent with *Skinner* and *Hall* had been retracted.

On 24 February 2010, Mr Mellish filed a Petition for Review to the Supreme Court.

On March 15 2010, Christine Gregoire, governor of Washington State, signed into law a bill, HB2740 (unanimously passed by both the House and the Senate) whose sole effect was to overrule the Division II Court of Appeals ruling in *Mellish.*

Mr Mellish's Petition for Review was subsequently accepted by the Supreme Court.

GROUNDS FOR RELIEF AND ARGUMENT

Mellish *and the Relevant Case Law*

It is a well established principle of federal law that the timely filing of a motion for reconsideration suspends the finality of the previous decision, and thus extends the relevant appeals deadline, until the motion has been ruled on. The following extract from *Morse v. United States*, 270 U.S. 151 (1926) is frequently quoted in the relevant case law:

> There is no doubt under the decisions and practice in this court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the motion or petition. Brockett v. Brockett, 2 How. 238, 241; Washington, G. & A. Railroad Co. v. Bradley, 7 Wall. 575, 578; Memphis v. Brown, 94 U.S. 715 , 718; Texas & Pacific Railway Co. v. Murphy, 4 S. Ct. 497, 111 U.S. 488 , 489; Aspen Mining & Smelting Co. v. Billings, 14 S. Ct. 4, 150 U.S. 31 , 36; Kingman v. Western Manufacturing Co., 18 S. Ct. 786, 170 U.S. 675 , 678; United States v. Ellicott, 32 S. Ct. 334, 223 U.S. 524 , 539; Andrews v. Virginian Railway, 39 S. Ct. 101, 248 U.S. 272 ; Chicago, Great Western Railway Co. v. Basham, 39 S. Ct. 213, 249 U.S. 164 , 167.

It is also well established at the federal level that, although a party may appeal a final decision directly it is served, once a Motion for Reconsideration has been filed, that

filing renders the decision non-final until the motion has been ruled on. See e.g. *ICC v. Locomotive Eng'rs*, 482 U.S. 270 (1987):

> Even though the petition for judicial review was filed more than 60 days after the May 18 order was served, it was nonetheless effective, because respondent unions' timely petitions for administrative reconsideration stayed the running of the Hobbs Act's filing period until the ICC denied reconsideration. Although a contrary conclusion is suggested by the language of 49 U.S.C. §10327(i), which provides that, notwithstanding the statutory provision authorizing ICC reconsideration of its orders, a Commission action is final and can be appealed on the day it is served, in view of prior constructions of similar language in 5 U.S.C. § 704, that language must be construed merely to relieve parties from the requirement of petitioning for reconsideration before seeking judicial review, but not to prevent reconsideration petitions that are actually filed from rendering orders under reconsideration nonfinal. Pp. 482 U. S. 284-285.

The federal rule forms the basis for a chain of Washington State case law on the subject, which starts with *Simonson v Veit*, 37 Wn. App. 761 ("*Simonson v Veit*"), continues with *Hall v. Seattle School District*, 66 Wn. App. 308, 831 P.2d 1128 ("*Hall*"), and culminates with *Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 232 P.3d 558 (2010)("*Skinner*"). *Simonson v. Veit* bases its conclusion that "The period allowed for the filing of a notice of appeal under RAP 5.2 does not commence until the trial court has acted upon a timely motion for reconsideration." on the aforementioned federal rule, as well as on the considerations of logic, due process, and judicial economy that underlie it:

> The Rules of Appellate Procedure do not deal with the effect of a motion for reconsideration on the time for appeal. In federal court the general rule is that "if a motion or petition for a rehearing is properly and seasonably made or presented and entertained by the court, the period limited for instituting appellate

proceedings does not begin to run until the motion or petition is disposed of . . ." Annot., MOTION OR PETITION FOR REHEARING IN COURT BELOW AS AFFECTING TIME WITHIN WHICH APPELLATE PROCEEDINGS MUST BE TAKEN OR INSTITUTED, 10 A.L.R.2d 1075, 1079 (1950). The reasoning behind the rule is that a timely petition for rehearing suspends the finality of the judgment pending that court's further determination on whether the judgment should be modified, Annot., at 1080; COMMUNIST PARTY v. WHITCOMB, 414 U.S. 441, 38 L. Ed. 2d 635, 94 S. Ct. 656 (1973). A similar analysis was used in SITKO v. ROWE, 195 Wash. 81, 79 P.2d 688 (1938), where the court held that the time for a notice of appeal does not begin to run until the entry of an order denying the motion for a new trial. It would serve no purpose to require appellants to file a notice of appeal while a motion for reconsideration or new trial was pending in the court below. The notice of appeal was filed within 30 days of the denial of the motion for reconsideration and properly brings the judgment before us for review. (*Simonson v Veit*, 37 Wn. App. 761)

The next case in the chain, *Hall v. Seattle School District*, 66 Wn. App. 308, 831 P.2d 1128 ("*Hall*"), , bases its finding that "When a party has filed a timely motion for reconsideration of a decision by a hearing officer regarding an adverse change in the contract status of a certificated school district employee, the 30-day period for filing an appeal (RCW 28A.405.320) begins to run on the date of the hearing officer's decision on the motion for reconsideration." on the case *Simonson v Veit* quoted above, as follows:

> Hall asserts that even if the hearing officer may entertain motions for reconsideration, the time for appeal runs from the date of the initial decision, not from his ruling on the motion for reconsideration. We disagree. In *Simonson v. Veit*, 37 Wn. App. 761, 683 P.2d 611, *review denied*, 102 Wn.2d 1013 (1984), this court followed the general federal rule in holding that under the Rules of Appellate Procedure, when a timely motion for reconsideration has been made, the time for notice of appeal does not run until the lower court has entered an order on the motion.

The most recent case to address the issue is *Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 232 P.3d 558 (2010) ("*Skinner*"), recently reviewed and affirmed by the Supreme Court. Basing its reasoning on *Hall* (to which it refers extensively), the court in *Skinner* finds as follows:

> Where an order of a quasi-judicial body provides a timeline within which a party may file a motion for reconsideration of its order, and a motion for reconsideration is filed and denied, the time for an appeal runs from the date of the denial of reconsideration and not from the date of the initial order. (*Skinner* at 550)

The Opinion in *Mellish* is clearly inconsistent with *Skinner*, as well as with the reasoning in *Hall* and *Simonson*, and with the general federal rule supporting that reasoning.

The Mellish Opinion and the Rules of Statutory Construction

The Opinion violates the rules of statutory construction, since it gives rise to strained and absurd results and fails to give effect to the intent of the legislature. This failure to apply the principles of statutory construction is clear from the Opinion itself (Page 8, citation omitted):

> This omission creates an odd result. [A] practitioner who is contemplating a challenge to a judgment may be tempted to use the relatively simple and inexpensive motion for reconsideration [as an] alternative to an appeal." ... As written now, however, LUPA requires that an aggrieved party file a land use petition within 21 days of the final decision, regardless of whether reconsideration is pending. If the local government grants reconsideration, even in part, such a land use petition would probably become moot. And it is unclear whether a petitioner has exhausted his administrative remedies, a requirement for standing under LUPA, if the local government provides a method for reconsideration that he has declined to pursue. (Opinion, Page 8)

In the following two sections we examine the relationship of the opinion to the intent of the legislature and the rules of statutory construction, in the light of the above extract.

Failure to Give Effect to the Intent of the Legislature

The stated legislative intent of LUPA is "to reform the process for judicial review of land use decisions made by local jurisdictions... in order to provide consistent, predictable, and timely judicial review" (RCW 36.70C.010). It is clear from the extract above that the Opinion does not give effect to that intent. The contrast between the complete lack of clarity in the scenarios referred to above and the 'consistent, predictable, and timely judicial review' that is the stated purpose of LUPA (RCW 36.70C.010) (and that should be the aim of any judicial appeals process) could not be more obvious. If even the Division II Appeals Court themselves are uncertain how the appeals process would play itself out in the eventualities they mention, how are the parties supposed to know?

That the Opinion contradicts the intent of the legislature is also apparent from the speed and unanimity with which the legislature passed a bill, HB 2740, whose sole purpose is to overrule the Opinion. The Bill Analysis of HB2740, specifically referring to *Mellish* and noting the inconsistency with *Skinner*, is attached as Appendix A.

Strained and Absurd Consequences

Some strained and absurd consequences of the Opinion's interpretation are stated in the extract from the Opinion above. There are plenty of others. For example, if the Motion for Reconsideration process lasts more than 21 days and relief is granted in favor of B, the initially-prevailing party A has lost the right to relief through a LUPA petition, through no fault of his own (he obviously can't file a petition to obtain relief from a decision in his own favor, and by the time the decision against him is issued, it's too late).

Also, even a land use jurisdiction whose Motion for Reconsideration timeline would normally allow for a LUPA appeal, can render their decision unappealable simply by delaying it. Since the 21-day window is jurisdictional, no aspect of their decision can be appealed – even the improper delay. The Opinion also opens the door to the possibility of the same matter being appealed simultaneously at the judicial and administrative levels, potentially giving rise to unnecessary confusion, wasted judicial effort, inconsistency, and chaos.

The last sentence of the extract above, "it is unclear whether a petitioner has exhausted his administrative remedies, a requirement for standing under LUPA, if the local government provides a method for reconsideration that he has declined to pursue.) (Opinion, page 8), is an almost gratuitous muddying of the waters. Up to now it has been universally accepted practice in Washington State that a party in a land use case has the option to file a Motion for Reconsideration or to proceed directly to an appeal, but that where a Motion for Reconsideration is filed it constitutes a potential 'administrative remedy' that is only exhausted when the Motion has been ruled on. This is consistent with the federal rule in *ICC v. Locomotive Engineers,* referred to earlier, that

> "...that language must be construed merely to relieve parties from the requirement of petitioning for reconsideration before seeking judicial review, but not to prevent reconsideration petitions that are actually filed from rendering orders under reconsideration nonfinal". Pp. 482 U. S. 284-285.

While this issue is somewhat peripheral to present case, it is not explicitly dealt with by HB 2740, and thus the court may wish to take the opportunity to clarify the law and thus render the Washington State land use review process more "consistent, predictable, and timely" (RCW 36.70C.010)

The Meaning of the Term 'Final Determination'

Of course, if the language of the LUPA statute clearly and unambiguously carved out a specific exception to the general rule we have described, grounded in specific statutory language and preferably citing some specific reason for the exception, none of these considerations of statutory construction, or even of consistency with other case law, would be relevant. A statute whose meaning is plain on its face must be construed in accordance with that plain meaning, irrespective of the principles of statutory construction (as noted by the Opinion in the last paragraph of page 8).

An example of such a clear and unambiguous exception to the general rule on Motions for Reconsideration is the federal case *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) ("*Stone*"), referred to by the Opinion on page 9. Stone refers to the general federal rule as follows:

> It is also clear that the Hobbs Administrative Orders Review Act, which Congress has directed governs review of deportation orders, embraces a tolling rule: The timely filing of a motion to reconsider renders the underlying order nonfinal for purposes of judicial review. *ICC v. Locomotive Engineers*, 482 U.S.270. (*Stone* at 390)

Stone then points to very specific language carving out an exception to that general rule, as follows:

> However, Congress instead specified 10 exceptions to the use of Hobbs Act procedures, one of which is decisive here. Section 106(a)(6), added to the INA in 1990, provides that whenever a petitioner seeks review of an order under §106, "any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." (*Stone* at 390)

Stone also points out unique features of the deportation process, as opposed to other federal law, that make the exception appropriate – in particular, that the denial of a

Motion for Reconsideration renders the alien liable to immediate deportation, making the question of a subsequent appeal moot[1]:

However, the Opinion in *Mellish* offers no clear analysis, comparable to that in *Stone* above, demonstrating that LUPA should be an exception to the general rule set down in *Skinner*, *Hall*, and federal law. The bar for the persuasiveness of such an analysis must be set very high, due to the inconsistency with existing case law and the lack of compliance with the principles of statutory construction. The Opinion, on page 11, second paragraph, states:

> In nearly every legal context, a timely reconsideration motion tolls the statute for appealing a matter. No case law stated the contrary in the LUPA context until we addressed the question today and, until we filed this opinion, reasonable practitioners and pro se litigants may have concluded that filing a reconsideration motion gave them more time to file a LUPA appeal. (Opinion, Page 11)

An unambiguous statute is one that allows of only one reasonable interpretation. Thus, a statute does not unambiguously say a certain thing if reasonable people may have concluded otherwise. Therefore, since the Opinion allows that reasonable people have indeed concluded otherwise, logically it follows that either LUPA is ambiguous – in which case the analysis above in terms of the principles of statutory construction may be applied – or LUPA unambiguously says the contrary of what the Opinion claims. (As a side note: the appellant's background is in formal mathematical logic. In formal logic, the

[1] "Underlying considerations of administrative and judicial efficiency, as well as fairness to the alien, support the conclusion that Congress intended to depart from the conventional tolling rule in deportation cases. While an appeal of a deportation order results in an automatic stay, a motion for agency reconsideration does not. Congress might not have wished to impose on aliens the Hobson's choice of petitioning for reconsideration at the risk of immediate deportation or forgoing reconsideration and petitioning for review to obtain the automatic stay. In addition, the tolling rule's policy of delayed review would be at odds with Congress' fundamental purpose in enacting § 106, which was to abbreviate the judicial review process in order to prevent aliens from forestalling deportation by dilatory tactics in the courts." *Stone* at 395

above is a valid syllogism, and I believe sufficient to decide the case. Nevertheless, the appellant appreciates that the Court may desire more in the way of detailed argument, which this brief will now provide)

LUPA states that a "land use decision" may be appealed within 21 days, and defines a "land use decision" as a "final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW 36.70C.020(2). Thus, to find out what is the 'final determination', one first determines the "body or officer with the highest level of authority' and then, if that body or person makes more than one determination, looks for the 'final' one. The dictionary sense of the word 'final' is "coming at the end : being the last in a series, process, or progress" (Merriam-Webster, Webster's Dictionary, 2010), and in this sense the 'final' determination is clearly the one on the Motion for Reconsideration.

There is also more specific case law on the precise meaning of the term 'final determination' in the LUPA context, discussed in the first paragraph of Page 5 of the Opinion. Let us follow the Opinion in its definition of "final determination" as being the one that "leaves nothing open to further dispute and which sets at rest the cause of action between the parties" and "concludes the action by resolving the petitioner's entitlement to the requested relief," and examine which determination that would be. We will keep the investigation as general as possible for as long as possible, then pass to the specifics of Jefferson County code and the case in question. These three criteria,

- Resolv[es] the petitioner's entitlement to the requested relief
- Sets at rest the cause of action between the parties

- Leaves nothing open to further dispute

all point to the 'final determination' being the decision on the Motion for Reconsideration.

First, let us examine the notion of "resolving the petitioner's entitlement to the requested relief". When a Motion for Reconsideration is filed, the petitioner is claiming that he or she is entitled to certain relief. The other, initially prevailing, party will almost certainly not agree. In response to the Motion for Reconsideration, the local jurisdiction's relevant body or officer may allow, deny, or partially allow the requested relief. Thus the petitioner's entitlement to the requested relief is resolved when, and only when, that body or officer has ruled on the Motion for Reconsideration. The notion of "setting at rest the cause of action between the parties" is virtually synonymous with that of "resolving the petitioner's entitlement to the requested relief".

The notion of something being "open to further dispute" is perhaps a little more slippery, depending on what exactly is meant by 'dispute'. At its weakest, it might just mean that there is still a significant issue as to which either of the parties might still prevail. At its strongest, it might require that the Motion for Reconsideration procedure leave open the possibility that the parties may participate in some type of face-to-face adversarial proceeding. Jefferson County's Motion for Reconsideration procedure (which we shall examine shortly in the next section) leaves open the possibility of calling a closed record hearing (with due notice to the parties) at which each side has an opportunity to present its case. It thus satisfies even the strongest interpretation of "leaving something open to further dispute".

Application to Jefferson County Code and the Case in Question

Jefferson County's Motion for Reconsideration procedure reads as follows:

> *A party of record at a public hearing may seek reconsideration only of a final decision by filing a written request for reconsideration with the hearing examiner within five business days of the date of the final written decision. The request shall comply with JCC 18.40.330(5)(b). The hearing examiner shall consider the request without public comment or argument by the party filing the request, and shall issue a decision within 10 working days of the request. If the request is denied, the previous action shall become final. If the request is granted, the hearing examiner may immediately revise and reissue his/her decision or may call for argument in accordance with the procedures for closed record appeals. Reconsideration should be granted only when an obvious legal error has occurred or a material factual issue has been overlooked that would change the previous decision.*
>
> (JCC 18.40.310)

The Examiner is obliged to consider the Motion (note the words 'shall consider'). He has the power to order a closed record hearing at which each party may argue for its position. He has the power to grant the petitioner the requested relief by modifying or overturning the decision being reconsidered. The cause of action is still 'open to further dispute', since the parties may end up disputing the matter at a closed record hearing. It has not been 'set at rest', since the Examiner has the power to overturn or modify his previous decision. Thus, once a timely Motion for Reconsideration has been filed, none of the criteria for a 'final determination' mentioned in the Opinion are satisfied until the outcome of the Motion for Reconsideration process has been definitively settled, whether by denial of the Motion or through a closed record hearing.

There are a couple of points in the specifics of the procedure that are worth noting here. Firstly, where a closed record hearing is convened, the five days for filing a Motion for Reconsideration, plus ten working days (i.e. approximately fourteen calendar days)

for the Hearing Examiner to consider it, plus ten days for notice of a public hearing as required by JCC 18.40.230, go far beyond LUPA's 21-day window. So footnote 7, at the bottom of page 7 of the Opinion, is not correct in implying that Jefferson County's Motion for Reconsideration procedure always terminates in time for a LUPA appeal.

Secondly, the branch of the procedure in which the Hearing Examiner "may immediately revise and reissue his/her decision" might present a constitutional due process issue, depending on what is meant by 'revise' (if it merely means 'improve the language and logic without changing the conclusion' - the sense on which the Division II Appeals Court 'revised' its opinion in the present case – it might be OK). The issue is moot here because no such revision occurred, and "[The] essence of standing is that no person is entitled to assail the constitutionality of an ordinance or statute except as he himself is adversely affected by it." *Berman v. Denver*, 156 Colo. 538 (1965)(400 P.2d 434), *Sandoval v. Ryan,* Colo App., 535 P.2d 244, 247, *Black's Legal Dictionary*, entry on 'Standing').

The other two branches meet due process standards: where the motion is denied (as happened in the present case) the initially prevailing party's interests are not harmed, and where a closed record hearing is convened, both sides are notified in accordance with JCC 18.40.230 and have a chance to present their case. The Opinion notes the issue, and more or less explicitly declines to address it, in a footnote at the bottom of page 2.

Retroactive Applicability of HB 2740

"A statute may be deemed to apply retroactively if (1) it is remedial in nature, (2) retroactive application would further its remedial purpose, and (3) the Legislature has not clearly indicated its intent that it apply prospectively only. A statute is remedial if it

relates to practice, procedure or remedies and does not affect a substantive or vested right" (*Bayless v. Community College Dist* 84 Wn. App. 309,). Since (1), (2), and (3) above are clearly satisfied in the present case, the question of the retrospective applicability of HB 2740 reduces to that of whether it affect a substantive or vested right.

The scope and limits of the 'vested rights' doctrine are well summarized in *Vashon Island Comm. for Self-Government v. Washington State Boundary Review Bd.*, 127 Wash. 2d 759:

> [3] **Building Regulations - Land Use Regulations - Application - Vested Rights - Scope.** The vested rights doctrine is generally limited to land use applications, and usually applies to the principle that a land use application, under the proper conditions, will be considered under the land use laws in effect at the time the application was submitted.
>
> and:
>
> [6] **Constitutional Law - Due Process - Property Interest Existing Statutes.** A person does not have a vested right in the continuation of existing statutory law.

What the 'vested rights' doctrine grants to Frog Mountain is the right to have the substantive validity of their permit judged against the criteria in force at the time of their application. For example, if Judge Williams had found Frog Mountain's permit invalid because their application did not meet articles of Jefferson County Code or state law enacted subsequent to the date of their application, then that would have been a violation of their vested rights.

However, that is not the case here. Judge Williams found that the permit did not satisfy the Jefferson County Code and state law in force at the time of application. Frog Mountain did not challenge this finding – despite their having every opportunity to do so – which thus became a verity on appeal. Thus no 'vested rights' were ever acquired.

The vested rights doctrine does not grant a party the right to have a whole statutory regime 'frozen in time', or remove the legislature's right to clarify procedural issues or fix anomalies. As stated in the *Vashon Island* case above, there is no 'vested right in the continuation of existing statutory law'[2]. The vested rights doctrine relates only to the question of whether a party's land use application satisfies the law and code in force at the time of application, which in the present case has already been decided in the negative by Judge Williams' unappealed ruling on the subject.

HB 2740 does not affect the physical aspects of a land use development. Therefore the land use "vested rights doctrine" does not apply to LUPA's appeal provisions. *Cf., Belleau Woods II, LLC v. City of Bellingham,* 150 Wn. App. 228, 208 P.3d 5 (2009). H.B. 2740 is a remedial measure that will be given retroactive application to all pending appeals. *Tomlinson v. Clarke,* 118 Wn.2d 498, 511, 825 P.2d 706, 713 (1992). A cause of action that exists only by virtue of a statute is not a vested right, and it can be retroactively abolished by the legislature. *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.,* 158 Wn.2d 603, 146 P.3d 914 (2006).

HB 2740 is remedial, procedural, and, as has been shown above, does not affect a substantive or vested right. It thus satisfies the criteria for retrospective applicability.

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[2] See also for example, In re Marriage of MacDonald, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985) ("Retroactive application of a statute does not deprive a person of due process unless it deprives him of a vested right. An expectation of the continuation of existing law is not equivalent to a vested property right".), and the considerable body of case law flowing from that decision.

CONCLUSION

Appellant respectfully requests the Court to affirm that the timely filing of a Motion for Reconsideration tolls LUPA's 21-day appeal window, and has always done so.

Failing that, Appellant respectfully requests the Court to decide that HB 2740, being remedial in nature and not affecting a substantive or vested right, may be applied retrospectively to the case in question as well as to other similar cases.

Dated this 8th day of September 2010,

Respectfully submitted,

By: M. S. Mellish

Martin Mellish, pro se

Appendix A

Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

Local Government & Housing Committee

HB 2740

Brief Description: Regarding the definition of land use decision in the land use petition act.

Sponsors: Representatives Seaquist and Angel.

Brief Summary of Bill

- Amends the Land Use Petition Act to clarify when the 21-day time limit for the filing of judicial appeals to local land use decisions begins to run.

Hearing Date: 1/18/10

Staff: Thamas Osborn (786-7129).

Background:

The Land Use Petition Act

The Land Use Petition Act (LUPA) was enacted in 1995 to provide uniform, expedited judicial review of land use decisions made by counties, cities, and unincorporated towns. Land use decisions subject to judicial review under the LUPA are limited to:

- applications for project permits or approvals that are required before real property can be improved, developed, modified, sold, transferred, or used;
- interpretations regarding the application of specific requirements to specific property; and
- enforcement by local jurisdictions of ordinances relating to particular real property.

Land use decisions that do not fall under the LUPA are approvals to use, vacate, or transfer streets, parks and other similar types of public property, approvals for area-wide rezones and annexations, and applications for business licenses. In addition, the LUPA does not apply to land use decisions that are subject to review by legislatively-created quasi-judicial bodies, such as the Shorelines Hearings Board, the Environmental and Land Use Hearings Board, and the Growth Management Hearings Board.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

A person seeking review of a land use decision must file a petition in superior court and serve all parties within 21 days of the issuance of the land use decision. The parties must follow certain procedures within specified timeframes that are meant to expedite the judicial process.

"Land use decision" is defined to mean a final determination by a local jurisdiction's governing body or officer with the highest level of authority to make the decision, including those with the authority to hear appeals at the local, non-judicial level.

Generally, the court sets a hearing within a few months of the filing of the petition. The court may affirm or reverse the land use decision or remand it for modification or further proceedings.

Judicial relief may be granted based on any one of the following grounds:

- the decision maker followed an unlawful procedure or failed to follow a required procedure;
- the land use decision is erroneous in its interpretation or application of the law;
- the land use decision is not supported by evidence;
- the land use decision is outside the authority or jurisdiction of the decision maker; or
- the land use decision violates the petitioner's constitutional rights.

Recent Court Cases Pertinent to LUPA Appeals

In recent years there have been conflicting decisions by the courts of appeal in this state regarding when time limits for the filing of judicial appeals begins to run in cases involving motions for the reconsideration of local administrative decisions.

In *Skinner v. Civil Service Commission of the City of Medina,* Division I of the Washington State Court of Appeals ruled that where the law allows a local, non-judicial motion for reconsideration of an administrative decision, the time limit for the filing of a judicial appeal runs from the date of the final order on the motion for reconsideration rather than from the date of the original administrative decision. *Skinner v. Civil Service Commission of the City of Medina,* 146 Wn. App. 171, 188 P 3d (2008). This ruling has been appealed to the Washington State Supreme Court, which has agreed to review the case.

Contrary to the ruling in *Skinner*, in 2009 Division II of the Washington State Court of Appeals ruled that under LUPA the 21-day limit for filing a judicial appeal begins to run on the date the order is entered on the original, administrative land use decision, regardless of whether a party has filed a local, non-judicial motion for reconsideration. *Mellish v. Frog Mountain Pet Care,* --- P. 3d ---, 2009 WL 4814955 (2009).

Summary of Bill:

The act clarifies that, under LUPA, when a motion for reconsideration of a local land use decision has been filed with the local decision making authority, the date of the "land use decision" is the date of the entry of the decision on the reconsideration motion rather than the date of the original decision.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.